

CANADA / JUDGMENT

Morris v. British Columbia (Workers' Compensation Board)

2020 BCCA 293

COURT

British Columbia Court of Appeal

DECIDED

28 October 2020

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2020 BCCA 293 Morris v. British Columbia (Workers' Compensation Board) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Morris v. British Columbia (Workers' Compensation Board), 2020 BCCA 293 Date: 20201028 Docket: CA46134 Between: Kerry Andrew Morris Appellant (Petitioner) And Workers' Compensation Board of British Columbia and Workers' Compensation Appeal Tribunal Respondents (Respondents) Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Goepel The Honourable Madam Justice DeWitt-Van Oosten On appeal from: An order of the Supreme Court of British Columbia, dated May 7, 2019 (Morris v. British Columbia (Workers' Compensation Board), 2019 BCSC 706, Vancouver Docket S188645). The Appellant, appearing in person: K.A. Morris Counsel for the Respondent, Workers' Compensation Board of British Columbia: B. Parkin J.M. Goosen Counsel for the Respondent, Workers' Compensation Appeal Tribunal: K. Koles D. Morrison Place and Date of Hearing: Vancouver, British Columbia October 13, 2020 Place and Date of Judgment: Vancouver, British Columbia October 28, 2020 Written Reasons by: The Honourable Madam Justice Saunders Concurred in by: The Honourable Mr. Justice Goepel The Honourable Madam Justice DeWitt-Van Oosten Summary: The appeal is from the dismissal of a petition for judicial review arising from delay of the Workers' Compensation Board in deciding an application by the appellant in the spring of 2017 to reopen his claim for wage loss benefits in respect of compensable injuries sustained in an accident in 2010. The appellant contends that there has been significant change in his medical condition that allows for the reopening. The petition for judicial review was filed in August 2018. In November 2018 the Board denied the request to reopen and the appellant has appealed that decision to the Workers' Compensation Appeal Tribunal (WCAT) but the appeal has been held in abeyance pending completion of this judicial review litigation. Held: Appeal dismissed. Absent compelling reasons, the remedies available under the Workers Compensation Act need to be exhausted by the worker before the court will undertake judicial review. The appellant's reopening application should be allowed to run its course under the Act. Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] Mr. Morris appeals from the dismissal by Madam Justice MacNaughton of his petition for judicial review. The petition concerns steps taken by Mr. Morris to reopen his wage loss benefits claim arising from injuries sustained by him in a motor vehicle accident in 2010, and the responses of the Workers' Compensation Board and Workers' Compensation Appeal Tribunal to his application to reopen. Formally, the petition challenged the inaction of the Board on his request to reopen his claim and decisions in 2013 to the effect his medical condition had plateaued in May 2012.
- [2] In these reasons, I refer to the Workers' Compensation Appeal Tribunal as WCAT. WCAT is the appeal body established by the Workers Compensation Act (R.S.B.C. 1996, c. 491, now R.S.B.C. 2019, c. 1). By section 240 (now s. 289), its jurisdiction encompasses a decision to reopen a matter previously decided by the Board if, since the decision, "there has been a significant change in the worker's medical condition that the Board has previously decided was compensable" (s. 96(2), now s. 125).
- [3] The petition for judicial review and, hence, this appeal, have their roots in the long delay of the Board in responding to Mr. Morris's request made in the spring of 2017, that his claim be reopened based on what he says is a significant change in his medical condition from that of May 2012, the date his medical condition was found to have plateaued. No action was taken by the Board in respect to his request between the time he made it in the spring of 2017, and March 7, 2018, when he was asked for confirmation he wanted his claim reopened and was advised he needed to submit medical information to the Board. By then Mr. Morris had commenced an internal challenge to the Board's failure to provide an answer. That process is described in detail in the reasons for judgment of Justice MacNaughton, and led to a WCAT decision in June 2018 to the effect the process was premature. That decision led to Mr. Morris filing the petition for judicial review, dismissal of which is now before us. By decision dated November 13, 2018, the Board declined to reopen Mr. Morris's 2010 claim. He has filed an appeal of that decision to WCAT. That extant WCAT appeal has been held in abeyance, sidelined while this appeal completes.
- [4] Mr. Morris's application to reopen has significant practical consequences for him. The decision in 2013 that Mr. Morris's medical condition had plateaued in May 2012, prompted the termination of temporary wage loss benefits he was receiving, payment of a permanent partial disability pension, and entitlement to certain vocational rehabilitation benefits. It also prompted the loss of his driver's licence that was essential to his work as a truck driver, causing him to lose his employment. Mr. Morris says he was unable to find work in the occupation proposed for him and that he consequently endured a period of unemployment. He says that it was by dint of his own efforts at rehabilitation that he regained sufficient capacity to drive a truck and was able, in 2015, to regain his driver's licence, allowing him to be employed again as a truck driver. On learning in 2017 that it may be possible for him to reopen his 2010 claim, Mr. Morris made his request seeking wage loss benefits for that period of rehabilitation. No decision having yet been given on Mr. Morris's request to reopen his 2010 claim, the petition for judicial review sought not only orders quashing the

determinations to date in respect of the reopening issues (to the effect there was no decision that could be appealed), but also an order determining his eligibility for wage loss benefits and an order directing calculation and payment of such benefits.

- [5] One may say that on its face Mr. Morris's application to reopen is not frivolous. If there was, as one would expect, medical evidence justifying the cancellation of his driver's license on the basis of incapacity arising from his compensable medical condition and differing medical evidence relating to that incapacity that justifies reinstatement of the driver's license, it appears there is at least some area for medical investigation. Nor is it apparent that material improvement in a medical condition is incapable of justifying a reopening of a benefits decision. These matters, however, are for the consideration by WCAT at this time, in the appeal that waits in the wings.
- [6] In my view, we must step past the tangle of proceedings, as disappointing as they have been for Mr. Morris, because they have been overtaken by the November 13, 2018 Board decision answering his request to reopen his claim. That decision opened the door for a proper, full, consideration of the Board's denial through the appeal to WCAT under its authority set out in the Act.
- [7] It is long established that, absent compelling reasons, a court will not undertake judicial review until the remedies available under the Act have been exhausted by the worker: *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (C.A.). In this case, Mr. Morris's challenge to the denial of his request to reopen his claim for wage loss benefits in relation to his 2010 compensable injuries fits within that principle. The court, in my view, clearly should defer to that process and allow the reopening application to run its course under the Act. I would dismiss the appeal on this basis alone.
- [8] As I have concluded that the appeal should be dismissed, I will not address many of the other issues discussed by the judge in her comprehensive reasons. There are however, three issues I would note, two I would reinforce, and the notice of constitutional question presented in the material must be answered.
- [9] The judge's findings include that aspects of the petition were rendered moot by the Board's November 13, 2018 decision with respect to reopening Mr. Morris's 2010 claim, that it is not the court's role to make decisions of entitlement to compensation under the Act, and that "the court cannot order WCAT to pay wage loss benefits". In my view those conclusions are firmly grounded in basic principles respecting the proper role of the court in such litigation.
- [10] The first of the matters that I would reinforce concerns Mr. Morris's assertion that the Board had lost jurisdiction because of its delay in addressing his application. On this, the judge said:
- [72] I accept that the Board has a public law duty to render a timely decision once it received a completed application. However, damages and other forms of relief are not recoverable from the court following inordinate delay. The proper remedy for delay is an order for

mandamus, compelling the public body to render a decision: *Wu v. Vancouver (City)*, 2019 BCCA 23. An order of mandamus does not require the public body to make a specific decision or determine a particular outcome. It is merely an order that a decision be made. Once made, the decision may be the subject of internal and external appeals [Emphasis added.]

- [11] The judge, in my view, applied the correct principle. Where, as here, a worker has a complaint that a statutory decision maker has failed to discharge its responsibilities to decide an application, the worker's remedy is to ask the court to direct the decision maker to fulfill its duty. In law this is called mandamus, but it is not necessary for the petitioner to use that technical word and it is enough to ask for a direction that the statutory decision maker fulfill its statutory function - that it reach a point of decision.
- [12] The second matter I would reinforce is the judge's response to the challenge to the 2013 decision which determined that Mr. Morris's medical condition had plateaued. The judge, correctly in my view, said in respect of this:
- [108] However, as the evidence of his recovery post-dated the WCAT Decision, it cannot have formed part of the record before WCAT. It is well-settled that evidence which was not before the tribunal in the first instance is not admissible on a judicial review: *Corcoran v. Workers' Compensation Appeal Tribunal*, 2014 BCSC 1087 at para 9; *Goulding v. British Columbia (Workers' Compensation Board)*, 2015 BCCA 223 at paras 6-7; and *Stein v. British Columbia (Human Rights Tribunal)*, 2018 BCCA 264 at para. 10.
- [109] In any event, s. 256 of the Act gives WCAT jurisdiction to reconsider one of its decisions on the basis of new evidence. The two-stage reconsideration process set out in the Act may be available to Mr. Morris if he wishes to pursue it.
- [110] Given that Mr. Morris' only challenge to the 2013 Decision is based on evidence that was not part of the record before WCAT, Mr. Morris cannot establish that WCAT's factual finding that his condition plateaued as of May 14, 2012, was patently unreasonable.
- [13] This issue opened a discussion at the hearing of the appeal on the availability for the WCAT appeal, of the new evidence that was relied upon by the Board in making its decision dated November 13, 2018. The appeal from that decision is not before us, but counsel for WCAT helpfully referred to chapter 9 of the WCAT Manual of Rules and Procedure. That chapter appears to allow broad scope to the parties to advance new evidence and to allow WCAT, in its discretion, to obtain and consider new information for purposes of the appeal. This feature of the Manual reinforces the general rule that new evidence is not for judicial review and that, at least in this workers' compensation context, any new evidence should be advanced and considered by the decision maker authorized by the Act to consider changes, both improvements and deterioration, in the work-related medical condition of a worker, before it may become part of a court record. It is this avenue that Mr. Morris must look to for presentation of new medical information, and pursuit of those remedies as may be available to compensate him for disbursements spent gathering medical information.

- [14] Last for comment is the notice of constitutional question. The material before us does not frame the specific constitutional inadequacies alleged by Mr. Morris, and constitutional issues were not raised by him in the Supreme Court of British Columbia. Leave is required of this court to consider new issues not raised before the court whose order is appealed. Here, there has been no evidence adduced and no considered decision in respect to those issues. As issues raised for the first time on appeal, I would not give leave to Mr. Morris to raise them on appeal, that is, I would not entertain the notice: *The Law Society of British Columbia v. Parsons*, 2016 BCCA 435.
- [15] I would dismiss the appeal. In the circumstances of this case, I consider each party should bear their own costs. "The Honourable Madam Justice Saunders" I agree: "The Honourable Mr. Justice Goepel" I agree: "The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 24 October 2026 · Esheria